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TOYO TIRE HOLDINGS OF AMERICAS INC., as successor in interest to
TOYO TIRE INTERNATIONAL, INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TOYO TIRE HOLDINGS OF
AMERICAS INC., a California
corporation, as successor in interest to
TOYO TIRE INTERNATIONAL,
INC.,

Plaintiff,

vs.

CONTINENTAL TIRE NORTH
AMERICA, INC., an Ohio corporation,
as successor in interest to GENERAL
TIRE, INC.; YOKOHAMA CORP. OF
AMERICA, a California corporation;
GTY TIRE CO., an Ohio general
partnership; and DOES 1-100,
inclusive,

Defendants.

Case No. SACV10-52-JVS(RNBx)

Assigned for All Purposes to:
HON. JAMES V. SELNA
DEPT. 10C

**PLAINTIFF TOYO TIRE
HOLDINGS OF AMERICAS
INC.'S MEMORANDUM
REGARDING DEFENDANTS'
RESPONSE TO THE COURT'S
ORDER TO SHOW CAUSE AND
TO THE DECLARATIONS OF
BARBARA HOPPA**

Date: August 4, 2010
Time: 10:00a.m.
Dept: 10C
Judge: Hon. James V. Selna

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1 **I. INTRODUCTION**

2 At the July 8, 2010 hearing on Plaintiff Toyo Tire Holdings of Americas,
3 Inc.'s ("Toyo-US") motion for preliminary injunctive relief, the Court made clear
4 that, if it were to issue the injunction, a key part of such ruling would be the
5 fulfillment of Toyo-US's outstanding TBR orders from mid-January to the present:

6 • "What I contemplate is imposing a requirement to report to the Court
7 within seven days *the partnership's timetable for fulfilling the backorders.*" Tr.,
8 pp. 53:24-54:1 (emphasis added).

9 • "What you are going to come back with if I grant the injunction is a
10 report spelling out *a timetable for satisfying the outstanding orders.*" Tr., p.
11 54:14-18 (emphasis added).

12 • "I intend to impose an obligation to *satisfy in a reasonable manner*
13 *the outstanding orders giving [Toyo-US] priority vis-à-vis [Defendants'] orders*
14 on the basis of when those orders were placed. In other words, ... if there are
15 outstanding orders from ... Toyo[-US], those get priority. That's what I am
16 contemplating." Tr., pp. 54:22-55:5 (emphasis added).

17 • "Assuming I enter an injunction, we need a concrete statement of what
18 -- *how you propose to satisfy the backorders.*" Tr., p. 55:13-15 (emphasis added).

19 Subsequently, in the Court's July 9, 2010 Final Order Granting in Part and
20 Denying in Part Plaintiff's Application for Preliminary Injunction (the "July 9,
21 2010 Order"), in pertinent part, the Court directed Defendants Continental Tire
22 North America, Inc. ("Continental-US") and Yokohama Corporation of America
23 ("Yokohama-US") (collectively, "Defendants") to:

24 "[S]ubmit a report, verified by one or more officers or managing agents,
25 *setting forth a timetable for satisfying Toyo's outstanding TBR orders,*
26 *which shall include approximate dates of deliveries and quantities.* It is the
27 Court's intent that the Defendants put in place a scheme for delivery which
28 approximately replicates historic delivery rates for the period 2008-2009.

1 Where necessary to achieve this, the Defendants shall give priority to Toyo's
2 outstanding orders over orders by the Defendants of a later date."

3 *See* Docket Entry No. 158 (emphasis added). And, in its July 13, 2010 Order
4 Granting Plaintiff Toyo Tire Holdings of Americas Inc.'s Motion for a Preliminary
5 Injunction (the "July 13, 2010 Order"), the Court stated a similar directive, with
6 further detail. *See* Docket Entry No. 181.

7 Based on the above, Defendants cannot reasonably argue that there was
8 ambiguity with respect to the Court's directive to satisfy Toyo-US's outstanding
9 TBR orders. Notwithstanding the Court's admonitions during the July 8, 2010
10 hearing and the plain language of its Orders, the July 23, 2010 Declaration of
11 Barbara Hoppa ("Hoppa Declaration"), including "Scenario 1" and "Scenario 2"
12 attached thereto, made *no* attempt to satisfy Toyo-US's outstanding TBR orders.
13 *See* Docket Entry No. 238. Rather, as stated in Toyo-US's Preliminary Response,
14 the July 23, 2010 Hoppa Declaration was riddled with a variety of pretextual
15 excuses as to why it may have been "difficult" to comply with the Court's Orders.
16 *See id.* Defendants' allegations of difficulty were belied by the Hoppa Declaration
17 itself, as Ms. Hoppa indicated that Defendants' purported challenges could be
18 attributed to the facts that

19 and that

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21 July 23, 2010 Hoppa Decl., ¶ 30.

22 Put simply, Defendants ignored the Court's express language because they intended
23 to use the TBRs that they had confiscated from Toyo-US to satisfy their own
24 customers.¹

25 ¹ Defendants challenged Toyo-US's assertion that the termination of Toyo-US's supply of GTY-
26 manufactured TBRs had frustrated, and would continue to frustrate, Toyo-US's customer
27 relationships. Interestingly, Defendants complained that compliance with the Court's Orders (in
28 which Defendants would have to re-incorporate Toyo-US into the production process) would lead
to a "decrease in customer satisfaction" because Defendants, respectively, would have fewer
TBRs to provide to their own customers.

1 Defendants' allegations of difficulty also have been undermined by their
2 submission of August 2, 2010. Prompted by the Court's July 28, 2010 Order to
3 Show Cause Why Defendants Should Not Be Held in Contempt (the "July 28, 2010
4 Contempt Order"), on August 2, 2010, Defendants filed a supplemental Hoppa
5 Declaration, in which Defendants proposed a "Scenario 3" that is materially
6 superior to Scenarios 1 or 2—in that Scenario 3 attempts to satisfy Toyo-US's
7 outstanding TBR orders and it provides estimated delivery dates and quantities of
8 TBRs for supply to Toyo-US. While Toyo-US continues to disagree with several
9 of the assertions of the July 23, 2010 Hoppa Declaration (and it continues to reserve
10 all rights in connection therewith), and although Toyo-US still is considering
11 Scenario 3 (which Toyo-US received on August 2, 2010), preliminarily, Toyo-US
12 believes that Scenario 3 provides a substantial step in the right direction and is
13 generally acceptable to Toyo-US, subject to the qualifications set forth below.

14 **II. DEFENDANTS' LACK OF CANDOR**

15 Defendants note that the Court scheduled the August 4, 2010 contempt
16 hearing *sua sponte*. See Defendants' Resp., p. 1. As such, Toyo-US does not take a
17 position regarding whether the Court should find Defendants in contempt of its
18 Orders. That said, Toyo-US notes the following:

19 • It is undisputed that neither Scenario 1 nor Scenario 2 contemplated
20 *any* provision by which Toyo-US's outstanding TBR orders would be satisfied.
21 Scenario 1 and Scenario 2 purported to restore Toyo-US's production of GTY-
22 manufactured TBRs to units per month. See Docket Entry No. 88,
23 June 22, 2010 Declaration of John F. Hagan, Ex. C; Docket Entry No. 126, July 7,
24 2010 Declaration of John F. Hagan, Ex. A.

25 • Defendants attempt to justify their failure to comply with the Court's
26 Orders by seizing on the Court's language that the production of TBRs should
27 approximate historic delivery rates for the years of 2008-2009. However,
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1 Defendants' scenarios did not include quantity information and delivery dates for
2 satisfaction of outstanding TBRs.²

3 • Defendants contend that Toyo-US submitted its August 2010 TBR
4 order in "bad faith." *See* Defendants' Resp., p. 3. This is incorrect. First, Toyo-
5 US's August 2010 TBR order provided the precise information that Defendants
6 sought. In her July 19, 2010 e-mail, Ms. Hoppa specifically requested that Toyo-
7 US provide its "*requirements based on the oldest from January's unfilled*
8 *orders[.]*" July 23, 2010 Hoppa Decl., Ex. B (emphasis added). Toyo-US's August
9 2010 TBR order provided Toyo-US's TBR requirements based on the oldest
10 unfilled orders from January 2010 to the present, and that amount was
11 TBRs. *See id.*, Ex. D. Moreover, in John Hagan's July 22, 2010 letter, Toyo-US
12 explained that it submitted the August 2010 TBR order to "make clear that Toyo-
13 US is not waiving its right to obtain [the] TBRs and that GTY has an
14 obligation to satisfy Toyo-US's outstanding and long overdue TBR orders."
15 August 2, 2010 Hoppa Decl., Ex. A. Defendants neglected to advise the Court that
16 they received Mr. Hagan's July 22, 2010 letter *before* they submitted the July 23,
17 2010 Hoppa Declaration to the Court—particularly given that Defendants filed the
18 declaration after the due date on July 26, 2010. *See* Docket Entry No. 237.
19 Defendants did not include or materially respond to Mr. Hagan's letter until their
20 August 2, 2010 submission—only after Toyo-US highlighted the absence of such
21 letter in its Preliminary Response.³ *See* Docket Entry No. 238.

22 • Defendants contend that Toyo-US did not "timely" respond to the two
23 scenarios that Defendants attempted to impose upon Toyo-US. *See* July 23, 2010
24 Hoppa Decl., ¶¶ 27-28; *see also* August 2, 2010 Hoppa Decl., ¶ 18. This claim is

25 ² Defendants contend that historical delivery patterns may have been increased by the slimness of
26 margins, but given the Court's clear directive regarding the satisfaction of outstanding orders, this
is insufficient.

27 ³ Defendant Yokohama-US already has been reprimanded by the Court for its lack of candor. *See*
28 Docket Entry No. 101.

1 disingenuous and overlooks two key facts. First, the Court issued the July 9, 2010
2 Order on July 9, 2010, which was 13 days before Ms. Hoppa communicated the
3 proposed scenarios to Toyo-US. It is unclear why Defendants waited so long to
4 propose the scenarios to Toyo-US. Second, when Defendants realized that they
5 were running out of time to comply with the Court's 14-day deadline, Defendants
6 finally contacted Toyo-US regarding their two scenarios, but Defendants gave
7 Toyo-US *less than three hours* to respond—even though that decision would
8 impact Toyo-US's entire TBR segment in the United States and the consideration
9 of the scenarios would involve several logistics, manufacturing, and/or sales
10 personnel (some of whom have busy travel schedules and pressing matters to
11 address on a daily basis). Nonetheless, Toyo-US provided a written response to
12 Defendants' scenarios on the same day—July 22, 2010. *See* August 2, 2010 Hoppa
13 Decl., ¶ Ex. A.

14 • Defendants' argument that they could not produce sufficient TBRs for
15 supply to Toyo-US given the "mold" capacity is misleading. Ms. Hoppa
16 acknowledged that Toyo-US molds had been returned to GTY as of July 20,
17 2010. *See* July 20, 2010 Hoppa Decl., ¶¶ 16, 37-39. The production scenarios
18 (Scenario 1 and 2) provided in the July 23, 2010 Hoppa Declaration were based on
19 the use of Toyo-US molds, even though molds Toyo-US molds were (are)
20 available for production.

21 • Ms. Hoppa's claim that it took Toyo-US one week to return the molds
22 to the GTY plant is a non-starter. *See* August 2, 2010 Hoppa Decl., ¶ 3. As
23 provided in the July 23, 2010 Hoppa Declaration, Toyo-US worked with Ms.
24 Hoppa to return the Toyo-US molds to the GTY plant in an expeditious fashion,
25 even given the coordination with Toyo-US's third-party transportation and storage
26 provider, the securing of a forklift to move the molds, and the delivery of the molds
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1 to GTY within a few days (excluding the intervening weekend). *See* July 23, 2010
2 Hoppa Decl., ¶¶ 13-16.⁴

3 • Ms. Hoppa contends that a “complicating factor” pertaining to the
4 number of TBRs that GTY could manufacture for Toyo-US relates to the eight
5 molds that have not been returned to the GTY plant. This is misleading. As
6 Defendants well know, Toyo-US was forced to remove its molds from the GTY
7 plant and Toyo-US subsequently returned molds to Japan in an attempt to
8 make up for the lost volume of some sizes of TBRs.⁵ *See, e.g.*, Docket Entry No.
9 110, June 20, 2010 Declaration of James Hawk (“June 20, 2010 Hawk Decl.”), ¶
10 27; Docket Entry No. 114, June 23, 2010 Declaration of Nobuhiko Watanabe, ¶¶
11 16-17. Those molds have been re-machined to fit presses in Toyo-Japan’s tire
12 production facility. *See, e.g.*, June 20, 2010 Hawk Decl., ¶ 27. In any event, the
13 production of GTY-manufactured TBRs could be increased if all Toyo-US
14 molds were placed in production as soon as possible. Defendants have not offered
15 a material or manufacturing reason as to why Defendants cannot place all Toyo-
16 US molds in production to manufacture TBRs for supply to Toyo-US.⁶ Ms. Hoppa
17 states in the July 23, 2010 Hoppa Declaration that it would be “costlier” to run all
18 of Toyo-US’s molds in the production process, but that is not a sufficient
19

20 ⁴ Moreover, the molds had to be removed, at Toyo-US’s expense, at the demand of its once
21 trusted partners. The expense for returning the molds also was borne by Toyo-US.

22 ⁵ Even Defendants’ counsel, Mr. Werlin, recognized at the July 8, 2010 hearing that certain of the
23 Toyo-US molds had been returned to Japan. *See* Tr., p. 53:14-16.

24 ⁶ To the extent that the production process would be more costly, that is because Defendants
25 chose to modify the specifications after they purported to terminate Toyo-US’s interest in the
26 GTY Partnership. Thus, Toyo-US should not be forced to pay for any modifications that were
27 made by Defendants and which Defendants seek to impose upon Toyo-US after they incorrectly
28 attempted to extinguish Toyo-US’s interest in the GTY Partnership in the first instance. On a
related note, Toyo-US has requested financial documents and information (to which it is entitled
as a GTY Partner) related to the 2010 standard cost and pricing per tire, but it has not yet received
these documents—including documents reflecting GTY’s 2010 budget plan, the 2010 pricing
forecast, the 2010 standard cost per tire, year to date manufacturing and pricing variances by
month, the 2009 audit report, the 2009 tax returns, and the 2010 Board Meeting Report.

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1 technical or manufacturing reason as to why Defendants cannot place all of Toyo-
2 US's molds in production. See July 23, 2010 Hoppa Decl., ¶ 39.

3 **III. CONSIDERING SCENARIO 3: FEASIBILITY**

4 **A. The "Priority" of Production Issue is Non Sequitur**

5 Under the newly-produced Scenario 3, Defendants claim that they can
6 produce a greater volume of TBRs but *cannot* comply

7 See Defendants' Resp., pp. 11-12. In
8 addition, Ms. Hoppa urges that Defendants were not certain of Toyo-US's priorities
9 for certain models of TBRs and that Toyo-US's

10 August 2, 2010 Hoppa
11 Decl., ¶¶ 7-9. This is a red herring and lacks foundation.

12 • First, Toyo-US's orders from mid-January through July 2010 put
13 Defendants on notice of Toyo-US's needs with respect to certain models of TBRs.

14 • Second, the Court's July 13, 2010 Order specifically detailed, by TBR
15 model, the Toyo-US product code, and the GTY product code, the models for
16 which Toyo-US required immediate production.⁷ See Docket Entry No. 181.

17 • Third, Toyo-US's August 2010 TBR order contained a column marked
18 "Priority," which provided a ranking (in order of preference from 1-5) of each
19 pattern and size of TBR (including the corresponding product code information) for
20 which Toyo-US requested immediate production. See July 23, 2010 Hoppa Decl.,
21 Ex. D; cf. August 2, 2010 Hoppa Decl., ¶¶ 10-16.

22 • Fourth, Defendants' paternalistic overtures are not well-taken. Toyo-
23 US does not need Defendants to attempt to determine which TBRs to produce and
24 the "priority" in which such TBRs may be produced. *Toyo-US has a simple*

25
26 ⁷ As the Court may recall, Toyo-US included a listing of the model numbers of specific TBRs
27 when preparing a draft Order. Defendants objected to this clarification, but the Court overruled
28 that objection because the "language adds specificity to the injunction, a need which
Continental[-US] stresses[.]" Docket Entry No. 221.

1 *request—that Defendants place in production all of Toyo-US’s 58 molds and run*
2 *those molds continuously.* It has been more than six months and Toyo-US is
3 entitled to *all* of the TBRs that may be produced using its available molds,
4 regardless of their perceived “priority.” The Court’s July 9, 2010 and July 13, 2010
5 Orders provide that Toyo-US’s TBRs orders should take priority over Defendants’
6 TBR orders—not that some of Toyo-US’s orders must give way to other of its
7 orders.

8 **B. Scenario 3 Demonstrates That Defendants Can and Should**
9 **Produce Over TBRs Per Month for Toyo-US**

10 In his July 22, 2010 letter, Mr. Hagan estimated that, based on the use of
11 Toyo-US’s molds at the GTY plant, at low end, GTY can manufacture nearly
12 TBRs for supply to Toyo-US per month and that, at the high end, GTY can
13 manufacture more than TBRs per month for supply to Toyo-US. *See*
14 August 2, 2010 Hoppa Decl., Ex. A. Following the Court’s issuance of an order to
15 show cause regarding a finding of contempt, Defendants acknowledged that it was
16 (is) feasible (and safe) to re-incorporate Toyo-US into the production process. In
17 fact, Defendants estimated that GTY could produce nearly TBRs in August
18 2010 for Toyo-US (subject to some “ramp up” time, although this amount period
19 should be relatively short, *see id.*); nearly TBRs for Toyo-US in September;
20 and more than TBRs for Toyo-US in October. *See id.*, Ex. B. According to
21 Defendants’ schedule, the TBR production appears to taper off in November
22 (nearly TBRs) and December 2010 (nearly TBRs) before
23 commencing again in January 2011. While Toyo-US still is considering the details
24 of Scenario 3, Toyo-US believes that Scenario 3 is acceptable in principle, subject
25 to the proviso that the TBR production should remain at the peak level (nearly
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TBRs) in November and December 2010.⁸ Otherwise, Toyo-US reserves its right to seek and obtain the remainder of its 2010 allocation in 2011, as necessary.⁹

IV. CONCLUSION

Based on the foregoing, and in accordance with its initial review of Scenario 3 (as provided on August 2, 2010), GTY production of TBRs must begin immediately so as to address the multiple months of Toyo-US's outstanding TBR orders, pursuant to the Court's July 9, 2010 and July 13, 2010 Orders. The precise amounts of the TBR production and delivery dates should mirror the timeframe set forth in Scenario 3, subject to the proviso that TBR production shall be no less than

TBRs per month in November and December 2010. Toyo-US shall retain its right to obtain its remaining 2010 allocation of TBRs in 2011, as necessary.

DATED: August 3, 2010

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By: /s/ Daniel Prince

DANIEL PRINCE

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TOYO TIRE HOLDINGS OF AMERICAS INC., as
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INTERNATIONAL, INC.

⁸ The GTY factory would not have to "shut down" to solely manufacture TBRs for Toyo-US if GTY produced nearly TBRs for Toyo-US each month. See Tr., p. 55:6-13. Defendants would be able to obtain the remainder (nearly TBRs per month) to satisfy their own orders. In addition, under the Partnership Agreement, Continental-US operates a truck tire plant (separate from GTY, and which Continental-US failed to mention) in Mt. Vernon, Illinois, from which Defendants may obtain TBRs to compensate from any lost volume from GTY.

⁹ As stated in Mr. Hagan's July 22, 2010 letter, Toyo-US has not agreed to any specification changes that Defendants purported to make after incorrectly deciding to terminate Toyo-US's interest in the GTY Partnership. See August 2, 2010 Hoppa Decl., Ex. A. While Toyo-US may agree to the chafer angle change (from), Toyo-US does not consent to the use of a cost-cutting measure, as that may compromise the integrity of Toyo-US's products.

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